In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1200

ROBERT E. NIMS and
LAWRENCE L. LAGARDE, SR.

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Robert E. Nims and Lawrence L. Lagarde, Sr., petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a jury verdict of guilty for violations of 18 USC 1952 and 18 USC 1955, all of which took place in the United States District Court for the Eastern District of Louisiana in New Orleans.

OPINIONS BELOW

A jury trial was held following indictment of fourteen defendants joined together under a single conspiracy count. Each of the defendants, among them petitioners, was also charged with two substantive counts, one of violating 18 USC 1952 and USC 1955. The jury found each and all of the defendants not guilty of the conspiracy count, but some of the defendants, among them petitioners, guilty of the two substantive counts charged. An appeal, the Court of Ap-

ppeals affirmed, (Appendix A), and rehearing was denied on January 22, 1971. (Appendix B).

JURISDICTION

The denial of an application for rehearing was filed on January 22, 1971. (Appendix B). The jurisdiction of this Court is conferred by 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether a conspiracy indictment joining fourteen defendants and initially sought in bad faith by the prosecution to obtain jurisdiction, illicit joinder, and procedural, evidentiary, and prosecutoreal advantage is retroactively cured because subsequent to indictment the government through plea bargaining obtained uncorroborated and tainted testimony of an indicted alleged co-conspiratory supportive of the conspiracy count?

2. Whether the defendants, having at all appropriate intervals of the proceeding moved the Court for severance from illicit joinder procedurally made possible by indictment for a non-existent conspiracy,must prove through independent evidence prosecutoreal bad faith or may they rely upon the total absence of evidence supportive of a conspiracy, other than the testimony of an indicted alleged co-conspirator, acquired following the indictment.

3. Whether following a jury verdict of acquittal as to all defendants on the bogus conspiracy count, the illicitly joined defendants may be found guilty on substantive counts, after having been subjected to the prejudices and disadvantages which Rules 8 (b) and 8 (g) of the Federal Rules of Criminal Procedure prevent where properly applied?

STATEMENT OF THE CASE

In December, 1971, petitioners were indicted. The government sought and obtained indictments against twelve Louisianans and Bally Manufacturing Corporation of Illinois. The President of the Illinois corporation was also indicted. Bally Manufacturing Corporation is the largest manufacturer of coin operated amusement machines in the world. The corporation makes a wide variety of machines and peddles them to a legitimate and international market. Among the many types of machines produced by the company was a pin ball machine, which the prosecution refers to as the Bally Inline "gambling type" pin ball machine. This machine was at all times pertinent hereto legal for use in Louisiana. It's shipment to and use in Louisiana was not a violation of any federal, state or local statute or ordinance. It is against the state law to conduct a gambling business in Louisiana, with certain licensed exceptions such as horse racing. The prosecution charges that the defendants conspired to ship these machines into the State for the purpose of using the machines for illegal gambling.

The twelve Louisianians were for the most part owners of separate businesses. One of the defendants, Lawrence L. Lagarde, Sr., is a partner in Tac Amusement Company, a legitimate and substantial enterprise engaged in placing for public use a wide variety of coin operated machines in locations owned by others throughout Louisiana. These machines include coin operated pool tables, phonographs, and pin ball machines of several types. Prior to indictment, the Bally Inline, a pin ball machine which the prosecutors find offensive was in operation in Louisiana. The other petitioner, Robert Nims, is and was the owner of a completely separate legitimate and similar business, fiercely competitive to Lagarde's company.

The defendants were acutely aware that the charge of conspiracy as set out in the indictment was totally without merit. Any prosecutor seeking such an indictment would of necessity be mistaken as to the facts or in bad faith. Unfortunately, this case does not involve a prosecutoreal good faith lapse in judgment. The conspiracy count was bogus from the outset, and was used procedurally to join together Bally Manufacturing Company and its President, the prime targets of the prosecutor, with the twelve Louisianians. This strategy was used to gain a prosecutoreal advantage and designed to convict the manufacturing company and its president. The use in this case of the ubiquitous conspiracy charge backfired, for the jury found the primary targets, Bally and its president,not guilty on all counts charged. In fact, all of the defendants were acquitted on the conspiracy count.

Prior to trial the defendants filed motions objecting to joinder and praying for severance. One of the grounds for the motions was that this was a bad faith prosecution unsupported by evidence of conspiracy. Petitioners avered that the prosecutors presented no evidence to the grand jury upon which an indictment of conspiracy could be founded, but rather sought the indictment for purpose of joinder. This was an abuse of the grand jury system. Predictably, this motion was overruled by the District Court, for short of reading a transcript of the grand jury proceedings,which the Judge declined to do, the Court had before it only an unsubstantiated claim of prosecutoreal impropriety. This claim was met in argument by sweeping assurances that supportive evidence had been presented to the grand jury and would be put before the jury and the Court at trial. For weeks the prosecutor presented evidence to the trial jury, and none of it was to the conspiracy count as set out in the indictment. Finally, the government called John Elmo Pierce as its witness,and it is upon his testimony that the petitioners were

compelled by the District Court to go the jury for verdict.

Immediately following presentment of the prosecutors' case in chief,all defendants moved the District Court for a directed verdict on the conspiracy count, restating the pre-trial motions for severance on the grounds of illicit joinder. The trial judge overruled these in-trial motions except for defendants, Vincent and Salvadore Marcello, who were correctly ordered severed. The evidence presented by the prosecution against these defendants was identical in every respect to the evidence concerning the petitioners, with the exception of the testimony of John Elmo Pierce, which did not involve the Marcellos. The Trial Judge believed Pierce's evidence was sufficient to support the conspiracy count and that it presented a question for the jury to decide. In this he erred, and the Fifth Circuit Court of Appeals has affirmed this error. (It should be pointed out that the government subsequently dismissed the substantive counts against the Marcellos "in the interest of justice.")

John Elmo Pierce was one of the twelve Louisianians indicted in this case. His testimony was not available to the government until one year after indictment, and was not before the grand jury when the indictment was sought and received. Pierce made a deal with the prosecutors trading his testimony in this case for a dismissal of another federal indictment pending against him. Pierce, an admitted perjuror, gave testimony that he was present at two alleged meetings attended by petitioners; the first, to discuss a non-interference pact; the second, to discuss pay offs to local police authorities. His testimony remains uncorroborated. In fact, other government witnesses, testifying under immunity grants, who would have had knowledge of these meetings, denied they had occurred.

The Fifth Circuit focused upon this testimony as "enough" to support the conspiracy *indictment*. Admitting for the argument that the highly suspect evidence is "enough" to support the conspiracy count and creates a jury question, it was not available to the government for presentation to the grand jury, and only available immediately prior to trial as a result of a plea bargain.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Federal Rules of Criminal Procedure, Rules 8(b) and (g) set out requisites for joinder of persons and offenses. The Fifth Circuit correctly finds that neither the separate substantive offenses as charged in the indictment nor the relationship of the parties will support joinder in this case, absence a good faith conspiracy count. The Circuit Court in effect rules that defendants claiming prosecutoreal bad faith must present *evidence* of that bad faith. Having failed to do so, petitioners appeal on this ground is "frivilous," states the Appellate Court.

The only possible tangible evidence of prosecutoreal bad faith would be a post trial confession of some member of the prosecution team that the foul deed was done. Short of that improbable event taking place, the only other evidence which a defendant *can* advance is to point to the total lack of evidence of conspiracy presented at trial, particularly in a case where the defendants through pre-trial motions knowingly predict that the prosecution will be unable to honestly present evidence at trial supporting a non-existant conspiracy.

The government's position is stated in the appellate brief quoting from *Cacy v United States*, 298 F.2d. at 229

(9th Cir. 1961):

> "xxxThe proper rule would seem to be that when there is evidence from which a jury may find a connection,joining activity and conspiracy, the failure of the jury to convict in such a fashion will not *retroactively* establish misjoinder." (Emphasis supplied).

But, that is not the issue raised here, which is whether evidence acquired subsequent to an indictment for conspiracy will *retroactively* cure the prosecutoreal bad faith and make legal the originally illicit joinder.

Schafer v United States, 362 U.S. 511 (1960) does not stand for such a dubious rule of law. It is an absue of the grand jury system for a prosecutor to seek joinder by a use of a bogus conspiracy count. We submit that neither the majority nor the minority in *Schafer*, supra, intended to grant absolution to federal prosecutors employing this device if after having done so they acquire some evidence supportive of conspiracy no matter how tainted, as is the case here.

Petitioners were given light and compassionate suspended sentences by the Trial Judge. This petition is no desperate attempt to escape incarceration. The charge of bad faith which they lodge against attorneys representing the United States of America in this case is reluctantly rather than frivilously made. Surely, the government can point to *some* evidence, *any* evidence, *other than Pierce's*, which is supportive of the conspiracy *charged*. It has not and can not do so.

It would not be unreasonable for an unscrubulous

prosecutor to assume that if he causes an indictment of conspiracy against fourteen than one or even more will eventually become government property. In this case, it was necessary that the prosecutor do so in view of the total absence of evidence at the time of indictment. John Elmo Pierce had been indicted in another matter and acquiring his testimony was easy enough.

The disadvantages to a defendant in a conspiracy case are well known, and tolerated. They need not be enlarged.

CONCLUSION

That Bally Manufacturing Corporation was the primary government target was established in pre-trial evidentiary hearings.

That the only procedure available to the government to indict Bally was to join the petitioners is patent from the record.

That the only evidence supportive of conspiracy is that of John Elmo Pierce, acquired one year from indictment, by means of a deal.

The joinder here was calculated ,contrived and in fact, a gimmick.

The grand jury system has been abused.

The petitioners conviction on the substantive counts should be reversed.

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504 - 945-0253.

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of the Supreme Court of the United States, in good standing, and that 3 copies of the foregoing Petition for Writ of Certiorari have been mailed to the Honorable Gerald J. Gallinghouse, United States Attorney for the Eastern District of Louisiana, 500 St. Louis Street, New Orleans, Louisiana, 70130, this 20th day of February, 1976.

CECIL BURGLASS

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert E. NIMS and Lawrence L. LaGarde, Sr., Defendants-Appellants.

No. 74-1591
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1975.

The United States District Court for the Eastern District of Louisiana, at New Orleans, Herbert W. Christenberry, J., found defendants guilty of interstate travel in aid of racketeering, carrying on an illegal gambling business, and aiding and abetting, and they appealed. The Court of Appeals held that (1) even if the district court had dismissed conspiracy count, that would not have retroactively affected the validity of joinder based on that count, absent bad faith by the prosecutor; in any event, the district court did not dismiss the conspiracy count and the record showed that there was ample evidence from which the jury could have found a conspiracy, meaning that the joinder of defendants was not error; and (2) a count which, coming after a conspiracy count, alleges a substantive violation against several defendants and also alleges a violation of the aiding and abetting statute is not such a conspiracy allegation as to offend any rule against duplicitous charges.

Affirmed.

1. Criminal Law ⇐622(2)

Defendants failed to carry their heavy burden of showing that the district court abused its discretion in not granting a severance because of prejudice resulting from an otherwise proper joinder. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

2. Indictment and Information ⇐124(1)

Where an allegation of conspiracy is properly submitted to the jury, the fact that the jury acquits on the conspiracy count and convicts on the substantive counts does not affect the propriety of joinder. 18 U.S.C.A. § 371; Fed.Rules Crim.Proc. rule 8(b), 18 U.S.C.A.

3. Indictment and Information ⇐124(1)

Even if district court had dismissed conspiracy count, that would not have retroactively affected the validity of joinder based on that count, absent bad faith by the prosecutor; in any event, the district court in the instant case did not dismiss the conspiracy count and the record showed that there was ample evidence from which the jury could have found a conspiracy, meaning that the joinder of defendants was not error. 18 U.S.C.A. § 371; Fed.Rules Crim.Proc. rule 8(b), 18 U.S.C.A.

4. Conspiracy ⇐24

Essence of the crime of conspiracy is the agreement rather than the commission of the objective substantive crime. 18 U.S.C.A. § 371.

5. Conspiracy ⇐28(2)

Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. 18 U.S.C.A. § 371.

* Rule 18, 5 Cir.: see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

6. Conspiracy ⇐37

Conspiracy does not merge with the substantive offense, even if several of the defendants are alleged to have aided and abetted one another in the commission of the substantive offense. 18 U.S.C.A. § 371.

7. Indictment and Information ⇐125(3)

A count which, coming after a conspiracy count, alleges a substantive violation against several defendants and also alleges a violation of the aiding and abetting statute is not such a conspiracy allegation as to offend any rule against duplicitous charges. 18 U.S.C.A. §§ 2, 371, 1952, 1955.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, and GODBOLD and GEE, Circuit Judges.

PER CURIAM:

Appellants Nims and LaGarde were found guilty by a jury of violating 18 U.S.C.A. § 1952[1] (interstate travel in aid of racketeering), § 1955[2] (illegal gambling business), and § 2[3] (aiding and abetting). Their convictions arose out of the shipment of pinball machines from the Bally Company, William O'Donnell, President, in Chicago to Boasberg and

1. *§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

2. *§ 1955. Prohibition of illegal gambling businesses*

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

3. *§ 2. Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

his company, the New Orleans Novelty Company, in New Orleans. Boasberg was the distributor for Bally in the New Orleans area. He distributed the machines to novelty and amusement companies which in turn contracted with various bars and restaurants for the actual placement and operation of the machines for public use.

The indictment was in 16 counts. Count 1 alleged a conspiracy, 18 U.S.C.A. § 371,[4] against the Bally Company, its President O'Donnell, Boasberg, and 11 of the Boasberg's customers—including defendants Nims (Lucky Coin Machine Company) and LaGarde (TAC Amusement Company)—to violate § 1952. The next 8 counts alleged substantive violations of § 1952 and § 2 against the Bally Company, O'Donnell, Boasberg, and one or more of Boasberg's customers, each count being identical except that different customers were named in each count. The final 7 counts alleged substantive violations of § 1955 and § 2 against the Bally Company, O'Donnell, Boasberg, and one or more of Boasberg's customers, each count again being identical except that different customers were named. Only nine defendants went to trial and three of these were severed during the trial. The jury acquitted each of the remaining six defendants on the conspiracy count, acquitted the Bally Company and O'Donnell on all substantive counts, and convicted Boasberg, Nims, LaGarde, and LaGarde's partner Elms of violating the substantive counts alleging violations of §§ 1952 and 1955. Only Nims and LaGarde appeal.

Appellants contend that the District Court erred in not granting their motions for severance and that the offenses alleged in the indictment are duplicitous.

[1] Appellants have simply not carried—nor even attempted to carry—their heavy burden of showing that the District Court abused its discretion in not granting a severance under F.R. Crim.P. 14 because of prejudice resulting from an otherwise proper joinder. *See United States v. Lane*, 5 Cir., 1972, 465 F.2d 408. Rather, appellants' main contention concerning misjoinder is that their joinder was never proper under F.R.Crim.P. 8(b). They assert that the conspiracy count was brought in bad faith and solely for the purpose of permitting joinder, should have been dismissed at the close of the prosecution's case, and without the conspiracy count—of which the jury acquitted all defendants— joinder would not have been permitted under Rule 8(b).

We may assume appellants are correct that without the allegation of conspiracy, the separate offenses in which they were involved—linked only by the common participation of Bally Company, O'Donnell, and Boasberg—would not have been sufficiently related to permit joinder under Rule 8(b). *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *United States v. Gattie*, 5 Cir., 1975, 511 F.2d 608, 611; *United States v. Perez*, 5 Cir.,

4. *§ 371. Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

1973, 489 F.2d 51, 64–67; Moore's Fed. Prac. ¶ 8.06[2]. Thus, on this approach the inclusion of the conspiracy count was the key to appellants' joint trial.

[2, 3] Where an allegation of conspiracy is properly submitted to the jury, the fact that the jury acquits on the conspiracy count and convicts on the substantive counts does not affect the propriety of joinder under Rule 8(b). *Schaffer v. United States*, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960) (both the majority and dissent supporting this proposition); Moore's Fed.Prac. ¶ 8.06[3]. Appellants challenge the District Court's submission of the conspiracy count to the jury in the instant case, claiming that the prosecution presented no evidence to support it. But *even if* the District Court had dismissed the conspiracy count, the five Justice majority in *Schaffer* has held that this would not have retroactively affected the validity of joinder based on that conspiracy count, absent bad faith by the prosecutor. Though appellants make these allegations of bad faith here, they are totally unsupported by any evidence whatsoever and are frivolous.

But we need not rely on this narrow and often criticized, Moore's Fed.Prac. ¶ 8.06[3], holding in *Schaffer*, because the District Court did *not* dismiss the conspiracy count, and the record shows that there was ample evidence from which the jury could have found a conspiracy among all of Boasberg's customers. An unindicted customer, Pierce, testified that he and four other customers, including both appellants, met at Boasberg's to discuss not interfering with one another's operations and that there was a rotating system of payoffs to the local police by which *all* defendants benefited from police protection. The government, in addition, contends that a conspiracy could be inferred from various correspondence introduced below and from the long course of dealing that Boasberg's customers had with him and Bally Company. Pierce's testimony, however, concerning the noninterference agreement and the cooperative system of police payoffs is enough to support the allegation of conspiracy. The conspiracy count was properly included in the indictment and presented to the jury and therefore the joinder of defendants under Rule 8(b) was not error.

[4–7] In their second claim, appellants assert that the offenses charged in the indictment were duplicitous in that the substantive counts against them were really just mini-conspiracies of the overall conspiracy count. Appellants confuse the conspiracy offense and the entirely separate offense of actually violating § 1952.[5] The essence of the crime of conspiracy is the agreement rather than the commission of the objective substantive crime. Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *United States v. Rabinowich*, 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211 (1915); *United States v. Lowry*, 5 Cir., 1972, 456 F.2d 341. The conspiracy does not merge with the substantive offense. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); *Johnstone v. United States*, 5 Cir., 1969, 418 F.2d 1094. This is so even if several of the defendants are alleged to have aided and abetted one another in the commission of the substantive offense. The fact that several defendants are charged in the same count with violating § 1952 or § 1955 plus § 2 does not make that count another allegation of conspiracy. A count alleging a substantive violation against several defendants and also alleging a violation of § 2—aiding and abetting—is not such a conspiracy allegation as to offend any rule against duplicitous charges. There is no merit to appellants' claim that the offenses charged were duplicitous.

Affirmed.

5. It should be noted that each appellant was also convicted of violating § 1955—which was *not* an object of the conspiracy to violate § 1952—as well as convicted of a substantive violation of § 1952.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert E. NIMS and Laurence L. Lagarde, Sr., Defendants-Appellants.

No. 74-1591.

United States Court of Appeals, Fifth Circuit.

Jan. 22, 1976.

Appeals from the United States District Court for the Eastern District of Louisiana; Herbert W. Christenberry, Judge.

ON PETITION FOR REHEARING

(Opinion Dec. 5, 1975, 5 Cir., 1975, 524 F.2d 123)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

In his petition for rehearing, appellant points out a factual inaccuracy in our opinion. The second sentence in the seventh paragraph is therefore corrected to read as follows:

> An indicted customer, Pierce, who was among those defendants who pleaded either guilty or nolo contendere before trial, testified that he and four other customers, including both appellants, met at Boasberg's to discuss not interfering with one another's operations and that there was a rotating system of payoffs to the local police by which *all* defendants benefited from police protection.

In all other respects, the Petition for Rehearing is denied.